

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 439 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.R.SHAH

- =====
1. Whether Reporters of Local Papers may be allowed :
to see the judgement? Yes
 - 2 To be referred to the Reporter or not? Yes
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? No
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the concerned No :
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

DASHRATHBHAI MANABHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 439 of 2000
MR DEEPAK M SHAH for appellant
THROUGH JAIL for appellat
MR BD DESAI, ADDL.PUBLIC PROSECUTOR for Respondent
-

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.R.SHAH

Date of decision: 16/04/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.R.SHAH)

Instant appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 ("the Code" for short) against judgment dated March 24, 2000, passed by the learned Additional Sessions Judge, Camp at Anand, in Sessions Case No.181 of 1999, by which the appellant is convicted of the offences punishable under Sections 363, & 376 r.w.sec.511 of the Indian Penal Code ("I.P.C." for short) and sentenced to suffer R.I. for 10 years and fine of Rs.1000/-, in default, S.I. for six months.

2. In view of decision in the case of State of Punjab v. Ram Dev, 2003 A.I.R. SCW 6947, we do not propose to mention name of the victim.

The age of the victim on the date of incident was 5 years. The parents of the victim are residing at village Kunjraav, Taluka : Anand. The name of her father is Dineshbhai Rameshbhai Patel. The victim has one brother. On 30th May, 1998, the victim was playing with her brother and friends Jigisha and Sagar near Ramji Mandir. At that time, accused by enticing/inducing the victim to have ice, took the victim in the field wherein lemon trees were grown to rape her. The move was resisted by little girl. Therefore, she was beaten by the appellant and made to lie on the ground. Thereafter the accused removed his pant and after removing knickers of the victim, inserted his private organ in the vagina of the victim. Therefore, Jigisha and her brother went to call parents of the victim leaving victim alone with the accused. On receiving information, the father of the victim i.e. Dineshbhai along with one Ashwinbhai came to the field and on seeing them, the accused ran away. The victim was taken to hospital where she was treated by Dr.Rakeshkumar Avasthi. Thereafter complaint came to be filed at Khambhoraj Police Station against the appellant for the offences punishable under Sections 363, 376, 323 & 511 of I.P.C. The complaint was reduced into writing by PSI Mr. K.S.Thakor of Khambhoraj Police Station and sent to Anand Police Station for further action. Investigation of the case was conducted by Ramsinhbhai Dalsukhbhai Chaudhary, Circle Police Inspector of Anand. He drew panchnama of place of incident which was pointed out by the victim as well as by the complainant. He also attached clothes worn by the victim at the time of incident. The appellant was arrested on the very day i.e. 30th May, 1998 and was sent for medical examination. The clothes put on by the appellant were

also seized. The investigating officer recorded statements of the victim, complainant and other persons who were found conversant with the facts of the case. On completion of investigation, the appellant was chargesheeted of the offences punishable under Section 363, 376, 323 & 511 of I.P.C. in the Court of learned 3rd Jt. Judicial Magistrate, First Class, Anand. As the offence punishable under Section 376 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Anand, for trial where it was numbered as Sessions Case No.181 of 1999.

3. The learned Judge to whom the case was made over for trial framed charge against the appellant at Exh.4 of the offences punishable under Sections 363, 376 r.w.sec.511 of I.P.C. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (i) Dr.Rakeshkumar Avasthi, as PW.1 Exh.7, (ii) the victim as PW.2 Exh.13, (iii) Complainant Dineshbhai Rameshbhai as PW.3 Exh.14, (iv) Narendrabhai Chunibhai as PW.4 Exh.16 (panch witness of seizure of clothes of prosecutrix), (v) Jayantibhai Bhikhabhai as PW.5 Exh.18 (vi) Shashikant Gordhanbhai as PW.6 Exh.20, (vii) Ramsinbhai Dalsukhbhai Chaudhary (Investigating Officer) as PW.7 Exh.23, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as, complaint of father of the victim at Exh.15, injury certificate of the victim at Exh.8, injury certificate of the accused-appellant at Exh.9, panchnama of person of the victim at Exh.17, panchnama of seizure of clothes of the accused at Exh.19 and panchnama of scene of offence at Exh.21, in support of its case against the appellant.

4. After recording of evidence of the prosecution case was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, the case of the appellant was that he had not committed rape and was falsely implicated in the case. However, no evidence was led by him to substantiate his defence.

5. After appreciating the evidence adduced by the prosecution and hearing the learned counsels of the parties, the learned Judge held that the case of the prosecution against the appellant of the offences punishable under Sections 363, 376 & 511 of I.P.C. was proved beyond reasonable doubt. In view of this

conclusion, the learned Judge has convicted the appellant of the offences punishable under Sections 363, 376 & 511 of I.P.C. and imposed sentences referred to hereinabove by judgment dated March 24,2000, giving rise to this appeal.

6. Mr.D.M.Shah, learned counsel of the appellant, submitted that the appellant had not committed rape on the victim and, therefore, the appeal should be allowed. It was further submitted that looking to the age of the victim, the learned trial Judge should not have relied on her evidence and ought not to have convicted the appellant mainly relying upon the evidence of the victim who was, at the relevant time, aged 5 years and a child. He also submitted that considering the medical certificate and the evidence of Dr.Rakeshkumar Avasthi at Exh.7, at the most it can be said to be an attempt to commit rape and, therefore, conviction of the appellant under Section 376 of I.P.C. should be set aside by allowing this appeal. In the alternative, it was argued that looking to the facts and circumstances of the case and the age of the appellant, sentence less than 7 years should be imposed on him for commission of offence punishable under Section 376 I.P.C.

7. Mr.B.D.Desai, learned Additional Public Prosecutor, contended that the finding recorded by the learned Judge that the prosecution has proved that the appellant has committed offences punishable under Sections 363,376 & 511 of I.P.C. is neither unreasonable nor perverse, but is based upon the evidence on record and, therefore, the appeal should be dismissed. It was argued that the victim has narrated the incident in most natural manner and there is no reason whatsoever to disbelieve the testimony of the victim, more particularly in absence of exaggerations or contradictions or omissions. It was further submitted that looking to the evidence of the victim, it is clear that after satisfying himself that the child victim understood questions put to her and was able to give rational answers to questions as well as narrate the incident as it had happened, the learned Judge had recorded her testimony and has accepted the same as it was found to be truthful and therefore, the appeal should not be accepted. It was pleaded by the learned counsel of the respondent that the contention raised by the learned counsel of the appellant that the appellant was falsely implicated in the offence should not be accepted, as no enmity is suggested by the appellant. He has further argued that the testimony of the victim is also corroborated by the injuries proved through medical evidence as well as contents of the

complaint and sworn testimony of the complainant and, therefore, the appeal should be dismissed, but the appellant should be found guilty under Section 376 IPC and not for attempt to commit rape as held by the learned Judge. The learned A.P.P. submitted that no ground is made out by the learned counsel of the appellant to interfere with the well reasoned conviction of the appellant under Sections 363, 376 & 511 of I.P.C. and, therefore, the appeal should be rejected. Dealing with the alternative plea regarding reduction of sentence, the learned A.P.P. has relied upon the judgment in State of Karnataka v. Puttaraja (2004)1 SCC 475 and submitted that leniency in sentence relating to cases of rape being against public interest and object of sentence, plea for reduction of sentence should not be accepted by this Court. He has further argued that even looking to the age of victim and the crime committed by the appellant, the appellant does not deserve any sympathy and leniency.

8. We have heard Mr.D.M.Shah, learned counsel for the appellant and Mr.B.D.Desai, learned A.P.P. on behalf of the respondent-State. We have undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The case of the prosecution mainly rests on the testimony of the victim, who is child witness, and was aged 8 years when her evidence was recorded. Before discussing the evidence of the child witness, it would be advantageous to refer to the law relating to child witness. Section 118 of the Evidence Act deals with the question of competency of persons to testify. Under this section, all persons are competent to testify, unless they are, in the opinion of the Court, (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of its age. A child of tender years is not, by reason of its youth, as matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to section 118 of the Evidence Act, a child of tender age is a competent

witness if it appears that it can understand the questions put to it and give rational answers thereto. This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take is to satisfy himself that the child is the competent witness within the meaning of section 118 of the Evidence Act and for this purpose, preliminary inquiry should be held. It is the duty of the Court to ascertain in the best way, which it can, whether from the extent of his intellectual capacity and understanding the child witness is able to give a rational account of what he has seen, heard or done at a particular occasion or in other words, the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry, Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in positive, the Court will not, as a rule of prudence, convict the accused of a major offence on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. In the case of *Mohmed Sugul Esa Mamasan Rer Alalah v. The King*, AIR 1946 Privy Council, 3, it is held as under:

"In England, where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But, in the Indian Act, there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

10. Having noticed the principles, we would discuss the evidence of the victim. The age of the victim was about 8 years at the time when her deposition was recorded by the learned trial Judge on March 2, 2000. In order to satisfy whether the victim understood the questions put to her and was in a position to give rational answers to those questions or not, the learned Judge has maintained record incorporating the answers given by her to the questions put by the learned Judge. In the first question, the victim informed the Court her name and that she was studying in 2nd standard and that she was visiting temple. Further, the victim stated before the Court that she was likely to be visited with sin if she told falsehood. On holding of preliminary inquiry, the learned Judge was satisfied that the victim was capable of giving rational account of what she had seen and what was done to her at a particular occasion and, therefore, has recorded her testimony. The victim has narrated the incident happened on May 30, 1998. She has stated that she is residing with her parents at village Kunjrao. She has asserted that she knows the appellant and he is residing in her village and that he is the accused in the case. She has maintained before the Court that on 30th May, 1998 she was playing near temple with Jigisha, her brother and Sagar and the appellant had told her to go with him for having Ice and thereafter the appellant had taken all the four to the field wherein lemon trees were grown. She has also stated that the appellant had taken out his pants and thereafter the appellant had also taken out her panties. She has mentioned in her testimony that thereafter the appellant had put his private organ on her vagina and, therefore, Jigisha and others had gone to call her father. It is also stated that on seeing her father and Ashwinbhai, the appellant had run away and she was taken

at home and thereafter her father had taken her to hospital where she was treated. She had identified the accused in the court-room also. It is pertinent to note that the learned Judge has observed demeanour of this witness and recorded that she was scared while giving name of the appellant. In cross, she has stated that she was not knowing name of the appellant when he had taken her to field. She has further mentioned that all children playing with her were taken to field, but thereafter they had left the field and she was all alone in the field with the appellant. According to her, her father had come to the field after half an hour and was shouting and that she was not able to state the distance at which she had seen her father. She has maintained in cross also that she was lying on the ground when her father had come to the field. This is the cross-examination of the victim. In cross-examination nothing has come out which would destroy her testimony. Her evidence with regard to putting of private organ by the appellant on her vagina has not been challenged. Considering the evidence of the victim, it can be seen that she has narrated the facts as they are and she has narrated the facts and the incident in a most natural way. The way in which she has narrated the incident, has inspired confidence of trial Court and also inspired confidence of this Court. Her evidence does not show that she was tutored nor it is so suggested by the appellant in her cross-examination. Even her testimony is corroborated by medical evidence of Dr. Rakeshkumar Avasthi and evidence of the complainant i.e. her father. Therefore, it cannot be said that the learned trial Judge has erred in relying upon the testimony of the victim while convicting the appellant of the offences punishable under Sections 363, 376 & 511 of I.P.C.

11. Dr. Rakeshkumar Avasthi, PW.1, is examined on oath at Exh.7. He had stated that on 30th May, 1998, when he was on duty as Medical Officer at Kunjrao Primary Health Centre, the victim was brought to the hospital with police-yadi at about 5.50 P.M. in the evening and on her examination, following injuries were found : (i) swelling over right side of cheek, (ii) abrasion mark on middle of abdomen, (iii) reddish spots on both the sides (right & left of hip and thigh and private area). According to the Doctor, vagina was intact and there was no sign of bleeding nor there was vaginal dilation. He has further stated in his deposition that he had issued medical certificate of the victim which is at Exh.8. He has deposed that a person named Dashrathbhai Manabhai Parmar (appellant herein) was brought to the hospital at about 6.30 P.M. in the evening with police-yadi and he

was also examined by him and following injuries were found: (i) abrasion marks on both side of knee joint (right & left) due to pricks of thorn, (ii) abrasion marks on both the sides of elbow joint (right & left) due to pricks of thorn. He has also stated that he had issued medical certificate of the appellant, which is at Exh.9. He has deposed that when the appellant was examined, he was capable of having sexual intercourse. The said witness was cross-examined on behalf of the appellant. The suggestion made by the learned counsel of the appellant that the injuries which were found on the appellant could have been caused by insects bite, is denied by the doctor. He has maintained that the injuries found on the person of the appellant were due to thorns.

12. The complainant, i.e. the father of the victim, PW.3, is examined on oath at Exh.14. He has narrated the facts which are stated in the complaint. He has stated that on May 30, 1998, his daughter had gone to play near Ramji Mandir along with Jigisha and Jigisha had told him and Jagdishbhai about the victim having been taken to field by the appellant. This witness has stated in his deposition that Jigisha had taken him to the place where the appellant had taken the victim. He has also stated that when they reached the place where lemon trees were grown, the appellant had run away after pulling his pant. He has further stated that panty of her daughter was found lying below a lemon tree. He has stated that the victim was very frightened and was crying. He has stated that thereafter she was brought to home and on asking her about the incident, she had told him that the appellant had taken her by enticing her that he would give ice to her and thereafter the appellant had taken out his pant and also her panties and had put his private organ on her vagina. The witness has also stated that thereafter the complaint was filed and place of incident was shown by him. He has identified the accused in the court-room. In cross-examination nothing could be alleged against him. The defence has not been in a position to bring on record any noticeable contradiction. The witness has mentioned the incident as was mentioned in the complaint and he has also maintained that he had seen the appellant pulling over his pants while running away. There is no suggestion with regard to any prior enmity between the complainant and the appellant. Thus, the enmity is not suggested at all.

13. Thus, the evidence of the doctor and the evidence of the complainant fully corroborates the version and testimony of the victim. The evidence of Dr. Rakeshkumar

Avasthi as well as medical certificate completely corroborate the version of the victim to the effect that the appellant had put her private organ on her vagina because reddish spots were found on the private area of the victim. It is pertinent to note that the claim of the victim that the appellant had placed his private organ on her vagina has not been challenged by the appellant. Even while giving the statement under Section 313 of the Code, no explanation is given by the appellant with regard to the aforesaid fact and the evidence of the victim to the aforesaid extent has gone unchallenged. When the evidence has gone unchallenged, evidence must be accepted as true and accordingly, it is held that it is proved that the appellant had pushed her private organ on her vagina. It is also required to be considered that there was swelling on right side of cheek of the victim, which suggests that at the time of incident, the appellant had first beaten the victim who was only 5 years of age. One another thing which is also required to be noted is that injuries were also found on the person of the appellant i.e. abrasion marks on both sides of knee joint due to pricking of thorn and abrasion marks on both the sides of elbow joint due to pricking of thorn. The appellant has not explained injuries which were found on his person. Even in the statement recorded under Section 313 of the Code, no explanation is given by the appellant with regard to injuries sustained by him. When the incident had taken place in the field of lemon trees, thorns are bound to be there. However, the learned advocate of the appellant, on the basis of panchnama of scene of offence, has tried to argue that as grass was found, there was no possibility of thorns, but if the panchnama of scene of offence is closely read, it becomes evident that it is not mentioned therein that there was no possibility of thorns at all. What is stated is that grass was found and grass can be with thorns, more particularly in the field of lemon trees. On the basis of the aforesaid evidence and the injuries found on the person of the appellant and the evidence of the victim and the complainant, who had seen the appellant running away from the place of incident, it is proved beyond doubt that the appellant was present at the time of incident and he committed rape on the victim and, therefore, the appellant is rightly convicted by the learned trial Judge.

14. So far as submission made by the learned counsel of the appellant that the appellant was falsely implicated in the case is concerned, the appellant has not even remotely suggested that either the victim or her parents had any enmity with the appellant. There was no

reason for the victim to name the appellant as perpetrator of crime. At this stage, it would be relevant to notice the decision of the Supreme Court dealing with point of false implication of an accused in rape case. In *Prithi Chand v. State of Himachal Pradesh*, AIR 1989 SC 702, it was contended that the appellant was falsely involved due to a long standing enmity between the father of the appellant and the girl's father. The prosecutrix had in her deposition stated that the two families were not on talking or visiting terms, since their relations were strained. It was suggested in the course of cross-examination that Ratna, the son of PW.8 - Phulan Devi was intimate with the prosecutrix and he had raped the girl. In his statement under section 313 of the Code of Criminal Procedure, the appellant had put forth the case that when he had returned to his village in the evening, he had seen some ladies at the girl's house and heard the girl saying that she was subjected to rape by Ratna. Negating the contention that the appellant was falsely involved due to a long standing enmity, the Supreme Court has held that "It is not possible to believe that the prosecutrix and her parents would allow the real culprit to escape and falsely involve an innocent person for the commission of the crime. Except for the suggestion made in the cross-examination of PW.8-Phulan Devi, Ratna's mother and the statement under Section 313 of the Code, there was no other material on record which could give credence to the suggestion."

15. In *Promod Mahto & Ors. v. The State of Bihar*, AIR 1989 SC 1475, it was argued that a false case was foisted on accused due to communal feelings. The Supreme Court while negating the said contention, has held that even if communal feelings had run high, it is inconceivable that an unmarried girl and two married women would go to the extent of staking their reputation and future in order to falsely set up a case of rape on them for sake of communal interests.

16. Applying the principles laid down in abovereferred to two decisions of the Supreme Court to the facts of the case on hand, we find that the plea of false implication put forth by the appellant cannot be accepted. As noted above, there is not even slightest suggestion with regard to any prior enmity and even in further statement under Section 313 of the Code, there is no case to that effect. Considering the evidence of the victim, it cannot be said that the appellant is falsely implicated in the case. As false implication of the appellant is ruled out, the case put forth by the victim

will have to be accepted. The conviction of the appellant on the basis of testimony of the victim will have to be upheld, as her evidence inspires confidence and appears to the Court to be natural and truthful.

17. The submission made by Mr.D.M.Shah, learned counsel of the appellant on the basis of evidence of Dr.Rakehkumar Avasthi to the effect that vagina of the victim was intact and there was no sign of bleeding and, therefore, at the most it can be said to be an attempt to commit rape, as there was no penetration of private organ into the vagina of the victim, cannot be accepted. From the evidence of the victim, which is not challenged by the appellant, to the effect that the appellant had pushed his private organ on her vagina, it cannot be said that there was no penetration at all. Even the factum of pushing of private organ on the vagina is also corroborated by the medical evidence coupled with medical report. As stated above, the fact that the doctor had found reddish spots on the private area of the victim proves beyond doubt the factum of pushing private organ by the appellant on the vagina of the victim and, therefore, it cannot be said that there was no penetration at all.

18. In the case of Madan Gopal Kakkad vs. Naval Dubey and another, (1992)3 SCC 204, the Hon'ble Supreme Court has held that even slightest penetration of private organ into vagina without rupturing the hymen would constitute rape. In the case before the Hon'ble Supreme Court, the medical officer on examination of the victim after five days found abrasion on the medial side of labia majora and redness around labia minora with white discharge but hymen intact admitting tip of a little finger. In the said case, in view of absence of signs of full penetration, medical officer opined that there was an attempt to rape. In spite of the above medical finding disagreeing with the opinion of the medical officer and the report, the Hon'ble Supreme Court has held that on the basis of the medical findings alone, it can be safely concluded that there was partial penetration within the labia majora or vulva or pudenda which in the legal sense is sufficient to constitute rape and accordingly, opinion of the medical officer to the effect that it was an attempt to rape was considered to be an opinion of an inexperienced medical officer and the Hon'ble Supreme Court did not accept it.

19. In the case of Ranjit Hazarika v. State of Assam, (1998)8 SCC 635, the Hon'ble Supreme Court has held that non-rupture of hymen or absence of injury on

victim's private part does not belie her testimony. It is further held by the Supreme Court that to constitute rape, penetration however slight is sufficient. The Supreme Court has further held that opinion of the doctor that no rape was committed, cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. It is further held by the Supreme Court that corroboration to testimony of prosecutrix by medical evidence is not essential. In the said case, the case of the prosecution was that the prosecutrix aged 14 years was subjected to rape by the appellant. In the said case, the prosecutrix was witnessing a performance along with her girl friends at Dhanaising Chapori, which finished at about 3.30 a.m. and as she was leaving for her home, the appellant offered to walk with her to her house, but on the way, subjected to sexual intercourse without her consent and threatened her not to inform anybody about the occurrence. The prosecutrix, after having been subjected to rape, rushed to her house and informed her parents about the occurrence. F.I.R. was lodged and investigation was carried out. The prosecutrix was sent for medical examination and after completion of investigation, the appellant was tried for the offence punishable under Section 376 I.P.C. The prosecution, in support of its case, examined apart from the prosecutrix, her parents, besides the doctor and the investigating officer. The appellant in his statement under Section 313 of the Code denied the prosecution allegations. The statement of the prosecutrix was also recorded under section 164 of the Code, which clearly mentioned the manner in which the appellant had forcibly performed sexual intercourse with her. Her statement had remained virtually unchallenged in the cross-examination. The statement of the prosecutrix was amply corroborated by her mother and father. The Supreme Court has held that the mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact, did not belie the statement of the prosecutrix, as she nowhere stated that she bled per vagina as a result of the penetration of the private organ in her vagina. It is further held by the Hon'ble Supreme Court that to constitute offence of rape, penetration, however, slight is sufficient. It is also observed by the Supreme Court that in the cross-examination of the prosecutrix, nothing was brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The Supreme Court has further held that the opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix, and

this opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix.

20. Even Division Bench of this Court in Keshvananda Harinarayan Swami @ Kamal Vishweshwer Sharma vs. State of Gujarat, 1997(1) GCD 779, had held that it is not always necessary that there should be a complete action of coitus for the constitution of the offence punishable under Section 376 I.P.C. What is held by the Court is that a mere touch of visiting organ with the visited organ would suffice to constitute the offence of rape.

Considering the aforesaid principles laid down by the Hon'ble Supreme Court as well as by this Court, evidence of the victim, medical evidence and the medical report, it cannot be said that the appellant has not committed offence punishable under Section 376 of I.P.C.

21. In view of the aforesaid findings, as such the appellant should not have been convicted by the learned trial Judge for the offence punishable under Section 511 of I.P.C. and this Court is of the opinion that the appellant is guilty of the offence punishable under Section 376 I.P.C. and not under Section 376 r.w.sec.511 of I.P.C. Such powers are available with this Court under Section 386 of Cr.P.C. As per the power conferred under Section 386 of the Code, in an appeal from conviction, this Court can alter the finding maintaining the sentence or with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence, but not so as to enhance the same. In view of the aforesaid provision, this Court holds that the appellant should have been convicted only for the offence punishable under Section 376 I.P.C. and not for the offence punishable under Section 376 r.w.sec.511 of I.P.C.

22. The alternative submission that the appellant should be imposed sentence of less than 7 years cannot be accepted in view of the decision of the Supreme Court in State of Karnataka v. Puttaraja (supra) wherein guidelines to be followed by Courts in India while imposing sentence in rape cases, have been laid down. The pertinent observations made by the Supreme Court are as under :

"It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for

a crime which has been committed not only against the individual victim, but also against the society to which the criminal and the victim belong. The punishment to be awarded for a crime must not be irrelevant, but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal."

It is also observed that "rape is violation with violence of the private person of the victim, and abominable outrage by all canons."

Applying the principles laid down by the Supreme Court in the above-mentioned case to the facts of the present case and considering the age of the victim, we find that the appellant had disgraced the victim in repulsive manner. The appellant had by taking advantage of her tender age raped her. Normally, we find that punishment of 10 years R.I. is being imposed for commission of offence punishable under Section 376 I.P.C. and the learned trial Judge has rightly convicted the appellant of the offences punishable under Sections 363 & 376 I.P.C. and imposed sentence of 10 years, which is not required to be interfered with. The punishment imposed cannot be said to be, in any way, harsh or unwarranted, in the facts of the case. Having regard to the manner in which the appellant has committed offence under Section 376 I.P.C., reduction in sentence is not called for and, therefore, the plea of reduction in sentence cannot be accepted.

For the foregoing reasons, we do not find any substance in the appeal and the appeal is liable to be dismissed. Accordingly, the appeal is dismissed. Muddamal to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

(J.M.Panchal, J.)

(M.R.Shah, J.)

(patel)